Supreme Court, U.S.
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No. 85-348

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

VAL/DEL, INC.,
A Delaware corporation, Petitioner

v.

SUPERIOR COURT OF ARIZONA,
COUNTY OF PIMA, et al.
(Pascua Yaqui Tribe, Real Party
in Interest), Respondents

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
STATE OF ARIZONA, DIVISION TWO

REPLY TO RESPONSE TO PETITION FOR CERTIORARI

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Petitioner Val/Del, Inc., will confine itself to matters first raised in the Response. See Rule 22.5, Supreme Court Rules. In Arizona courts, the Tribe has relied exclusively upon Congressional recognition. Now, for the first time in these proceedings, the Tribe attempts to show that there are factual matters which would support a recognition by Congress of its tribal status.

The assertion is made at page 5 of the Response that at the trial level the Tribe "pointed out, among other things, that the use of the Spicer publication was questionable, and could certainly not be used to overrule Congressional mandate." This assertion is incorrect; the first objection of any kind taken to the trial court's judicial notice of the Spicer publications was at the Court of Appeals level. But regardless, the Arizona courts did take

judicial notice of Yaqui history, and rightfully so.

The assertion is made "there is no indication that the Court [trial court] gave any credence to Val/Del's exhibits of 'historical fact.'" Response at 5. This is incorrect. Judge Lillian Fisher, trial judge, in granting the Motion to Dismiss, stated:

> "Although such recognition [that of a sovereign tribe] may grant to the Pascua Yaqui Indian, who migrated to this country from Mexico, certain rights that are not available to other persons who migrated to the United States from Mexico, the Pascua Yaqui Indians are not precluded from seeking and obtaining status as a federally recognized Indian tribe." Minute Entry of August 7, 1984.

The only possible source for the information regarding migration was judicial notice -- presumably of Spicer I.

The expression of objection to the Spicer publications at the Court of Appeals level was perfunctory and consisted only of

the following sentence, included within a ten-page brief:

> "Petitioner offers in rebuttal two books in their entirety (Petitioner's Exhibits J and K), which books were not in evidence before the lwoer [sic] court and which are not properly attached as part of this Special Action. Neither book has the force of Federal law." Memorandum of Points and Authorities in Support of Pasqua Yaqui Tribe's Response to Petition for Special Action at 5.

There is no explanation of what the Tribe considers proper attachment. To this memorandum resisting special action, the Tribe attached four exhibits, consisting of thirty-nine pages, none of which in any way question the authority of Spicer nor the historical facts pertaining to the Yaquis in Arizona. The migration facts, noticed by Judge Fisher, were summarized for the Court of Appeals, similarly to the manner in which they have been summarized for this Court. In the briefs filed in the state courts, the Tribe has never attempted to

deny its Mexican origins or to assert that it has exercised any degree of self-government in this country.

Arizona has adopted its Rule 201 from the Federal Rules of Evidence (Rule 201) pertaining to judicial notice.

The case cited by the Tribe, *State v. Maguire*, 124 Ariz. 64, 601 P.2d 1348 (App. 1978), correctly states the rule that

> "an appellate court can take judicial notice of any matter of which the trial court may take judicial notice, even if the trial court was never asked to do so." 124 Ariz. at 65, 601 P.2d at 1349.

Here, both the trial and appellate courts were asked to take judicial notice of the history of the Yaquis. The trial court was pointed to Spicer I, the 1940 publication, and the appellate court to both this and Spicer II, the 1980 publication. Both courts accepted the Spicer works as containing materials whose accuracy cannot reasonably be questioned, and indeed, there

is no indication now that the Tribe questions the accuracy of Spicer's work.

The Court of Appeals' decision recognized that history establishes that these Indians have never exercised any political autonomy in the United States:

> "Petitioner presented to the trial court two books by Dr. Edward H. Spicer as authority for the proposition that the Pascua Yaqui Tribe would not qualify for federal recognition under the Code of Federal Regulations requirements. Spicer was an acknowledged authority on the history of the Pascua Yaquis, and his books establish that the Yaquis do not have single roots but are a historically mixed-blood people who lived in western Mexico on the Gulf of California from approximately the 1600's to the present. Beginning in the late 1880's, small groups came from time to time across the international border to Arizona and California. Therefore, Petitioner argues, since the Pascua Yaquis are not indigenous to this area, but rather are immigrants from Mexico, and because Dr. Spicer's books show that the tribe has not attempted to revive any system of government their predecessors may have established in Mexico, they could not qualify for federal recognition under 25

C.F.R. §83.7. We cannot fault this conclusion and, in essence, neither does the tribe." Court of Appeals Decision at 5-6.

The Court of Appeals went on to cite *Atkinson v. Haldane*, 569 P.2d 151 (Ala. 1977), and to hold that the question of whether this Tribe is entitled to sovereign immunity is a "nonjusticiable political question". Court of Appeals Decision at 6-7.

The Arizona courts were not remiss in taking judicial notice of the Yaqui history. *See State of Arizona v. State of California*, 51 S. Ct. 522 at 525, 283 U.S. 423, 73 L. Ed. 1154 (1931); *Kengla v. Stewart*, 313 P.2d 424, 82 Ariz. 365 (1975); and *Pawnee Indian Tribe v. U.S.*, 109 F. Supp. 860 at 870 (U.S. Ct. Cl. 1953).

Though the Tribe has carefully selected quotations from Spicer for its Response, there is nothing called to this Court's attention which indicates that these Indi-

ans have ever exercised any degree of political independence in this country.

A reading of all of the excerpts quoted establishes only that the Tribe had a unique religion, culture and language, which are different from those of the indigenous Indians of Arizona.

It has never been questioned by the Petitioner that the Yaqui Indians constituted a "tribe" in Mexico, and, as a matter of fact, the historical recitation pertaining to these Indians which has been submitted to this Court points out that the Yaqui towns in Sonora, contrasted with those in this country, had self-government (Petition at 14-15). The Yaqui Tribe still has a form of self-government in Mexico, in its native territory, on the Yaqui River. As part of the record below, the history of these people has been summarized in this language:

> "The Yaquis were restored to semi-autonomy in Mexico in 1937, when President Cárdenas, by presidential decree, set aside to the 'Yaqui Tribe' about a third of the lands the Yaquis had traditionally claimed, being those mostly on the north side of the [Yaqui] river (*id.*, [Spicer II], 265). A 'peculiar democracy' was established in the 'Yaqui Zone' under a unique system called the 'Yaqui Indigenous Community' (*id.*, 277-83). About 20,000 Yaquis reconcentrated in this Zone (*id.*, 274)." Petition for Review at 5.

Spicer, of course, was not contradicting his own history when he made the statement italicized at pages 14-15 of the Response:

> "One conclusion of my long and extensive study of Yaqui people is that they form a distinct Indian group or Tribe."

This statement, of course, has nothing to do with the issue here, and this is the best that the Respondent can do. What is apparent and admitted is that the Yaquis are a Mexican Indian Tribe of which some members have migrated to this country. These people are culturally different from

other U.S. citizens. The same can be said of many Jewish, Polish, Italian, Chinese and Irish communities in various of our larger cities, such as New York, Chicago, Detroit, Los Angeles and San Francisco. But speaking a different language and having a cultural uniqueness does not create an independent government, and this is what is happening when a recognition of sovereignty to an Indian tribe is granted.

RESPECTFULLY SUBMITTED this 17th day of October, 1985.

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